

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 98-758

April 13, 2000

PUBLIC UTILITIES COMMISSION
Investigation into Use of Central Office
Codes (NXXs) by New England Fiber
Communications, LLC d/b/a Brooks Fiber

SUPPLEMENTAL
EXAMINER'S REPORT

NOTE: This Report contains the further recommendation of the Hearing Examiner. It is stated as a recommendation of the advisors and is **NOT** in the form of a draft order. Parties may file **responses** or **exceptions** to the Examiner's Report issued on February 23, 2000 and this Supplemental Report on or before **Tuesday, April 25, 2000**. It is expected that the Commission will consider this report at its deliberative session on **May 1, 2000**.

In this Supplemental Examiner's Report, we explain in greater detail the Advisors' proposals concerning special services and rate for internet traffic ordered by the Commission in its *Order Adopting Factual and Legal Conclusions (June 22, 1999)*. In response to that Order, Bell Atlantic-Maine (BA-ME), on July 14, 1999, filed a proposed service and rate for internet traffic. In response to that filing, the advisors issued an Examiner's Report on February 23, 2000, that proposed to accept Bell Atlantic's proposal as far as it went, but also proposed that the Commission order Bell Atlantic to provide an additional wholesale rate derived from its proposed retail and single wholesale offering.

This Supplemental Examiner's Report is issued in response to the Request for Clarification filed by the Telephone Association of Maine (TAM) on March 3, 2000; Bell Atlantic's Reply to TAM's Request filed on March 24, 2000;¹ and the Renewed Request

¹Bell Atlantic filed its Response pursuant to a Procedural Order.

for Clarification filed by TAM on March 29, 2000. In this Report, we address three areas of apparent confusion or misunderstanding. We recommend to the Commission that it require Bell Atlantic and all other ILECs (independent telephone companies or ITCs), *in their capacities as interexchange carriers (IXCs) and as interexchange access providers*, to provide a set of three related special rates (one retail and two wholesale) for internet traffic. Other IXCs may offer such rates on an optional basis.

As noted above, this Report is in the form of the advisors' recommendation rather than a draft Commission order.

I. A SPECIAL RATE FOR INTERNET TRAFFIC SHALL BE OFFERED TO ISPS STATEWIDE; CALLERS SHALL BE ABLE TO ACCESS 500 NUMBERS FROM THROUGHOUT THE STATE

In the June 22, 1999 Order, the Commission proposed:

Under this plan, all ILECs would be required to offer a special rate to internet service providers (ISPs) for the transport of interexchange internet traffic

The rate would not be available to ISPs that offer voice services over the internet. CLECs would be permitted to offer the same kind of rate CLECs would also be able to purchase the service from the ILECs at a wholesale discount and resell it to ISPs.

Although some parts of the Examiner's Report refer to the service and rates proposed by Bell Atlantic, it is apparent that the Commission has always intended that all ILECs provide a special interexchange service and rates for internet traffic that are statewide in their availability. The service that Bell Atlantic proposed (labeled Single Number Service/Hubbed Primary Rate ISDN (SNS/PRI)) is an inward dialing service. It is much like 800 service and would use the prefix 500 and various 7-digit numbers assigned to

ISPs. The subscribers to the rate would be ISPs, not individual customers of ISPs. ISP customers would be able to call the 500 numbers without paying toll charges.²

The service is an interexchange service and the rate is an interexchange rate, for traffic that the Commission has found is interexchange. It is the advisors' understanding that the independent telephone companies (ITCs) concur in Bell Atlantic's interexchange rate schedules and all ILECs have access rate schedules and contracts that address the question of compensation (access charges) that are paid by Bell Atlantic to the ITCs and by the ITCs to Bell Atlantic. The advisors therefore expect that other ILECs (ITCs) will provide these services through concurrence.

In its responses to the ITCs' questions, however, Bell Atlantic appears to assume that the ITCs will offer the SNS/PRI services only if they specifically concur or independently establish their own rate schedules for these services. The Advisors have not reviewed the rate schedules of the ITCs, but believe that most of them do concur in Bell Atlantic's interexchange rates. It is the Advisors' recommendation that the Commission order all ILECs, in their capacities as interexchange carriers and as interexchange access providers, to provide the described services. ILECs other than Bell Atlantic may do so through their existing concurrence in Bell Atlantic's interexchange rates, through specific concurrence or through independent rate schedules.

²In the case of 800 service, 800 service customers located in BA territory are able to receive calls from *all* locations in Maine including calls originated by ITC end-users. The 800 service customer does not have to subscribe to an ITC service to receive those calls from end-users whose exchange service is provided by an ITC. We expect the same thing to be true with this 500 service. In cases where an ISP is located in ITC territory, the ISP would have to obtain the 500 service from an ITC.

II. COMPENSATION AMONG ILECS

Most or at least many ISPs are located in Bell Atlantic territory.³ End users (customers of those ISPs) who are located in independent telephone company territory, under the proposed system, will place 500-NXX-XXXX calls to those ISPs. For those calls, the ITCs are entitled to originating access payments by Bell Atlantic. Conversely, when an ISP is located in ITC territory, and a Bell Atlantic customer dials a 500 number assigned to that ISP, Bell Atlantic is entitled to originating access payments. In its Response, Bell Atlantic stated that because the SNS/PRI service was heavily discounted, it would not pay the independents their standard access rates. Bell Atlantic stated:

. . . the proposed tariff does not cover the terms and conditions for the exchange of traffic for this service between BA-ME and the ITCs, in either the originating (*i.e.*, ITC originated to BA-ME's ISP terminating subscriber) or terminating (*i.e.*, BA-ME originated to ITC's terminating ISP subscriber) direction. The specific terms and conditions for the exchange of this traffic would have to be negotiated in arrangements between BA-ME and the ITCs because existing agreements for the exchange of toll and local traffic between BA-ME and the ITCs do not cover the special class of traffic created by the Commission in this docket and served by this new SNS/PRI offering.

It also stated:

An ITC would need to determine for itself whether it desired to offer this service to its subscribers by concurring in BA-ME's filed tariff terms and conditions. The terms and conditions (including cost recovery) for the exchange of traffic originating or terminating on an ITC's network would need to be negotiated between BA-ME and the ITCs, most likely on the basis of an equitable division of the retail rate

³At the time the Commission made its factual findings, all of the ISPs that are customers of Brooks were located in Portland.

permitted by the Commission to be charged to the ISP subscriber.

The origination of a call by an ITC subscriber to a BA-ME "500" or "555" ISP subscriber is not traditional access service by the ITC because the Commission has determined that BA-ME's provision of the interoffice transport and delivery of this traffic is not to be considered or rated as traditional toll service. The Commission, in this docket, has created an entirely separate class of service for Internet-bound traffic only.

Because of these statements by Bell Atlantic, TAM has in effect questioned whether the Examiner's Report intended any particular result with respect to the matter of inter-ILEC compensation.

The Commission may have no jurisdiction over the matter of inter-company compensation, at least until such time as it is clear that the ILECs cannot agree among themselves on the matter of compensation. 35-A M.R.S.A. § 7901 makes clear that the Commission may establish compensation if the telephone utilities that carry each other's traffic cannot agree on compensation. It is possible, of course, that the Commission could open an investigation under 35-A M.R.S.A. § 1303 to address these issues, but the Commission has discretion whether to open such an investigation. In addressing the compensation issues, the ILECs should be mindful of the following considerations:

1. It is not entirely clear (contrary to Bell Atlantic's assertions) that "existing agreements with the exchange of toll and local traffic between BA-ME and the ITCs do not cover the special class of traffic" The Advisors are

not aware of any access tariffs or contractual arrangements between the ILECs that specifically exclude any particular toll traffic.

2. As claimed by Bell Atlantic, the Commission has established a special category of interexchange toll service for internet traffic, to be priced substantially below existing toll rates. Contrary to the implication by Bell Atlantic (through its assertion that "BA-ME's provision of the interoffice transport and delivery of this traffic is not to be considered or rated as traditional toll service") the Commission has not addressed the matter of access charges or compensation between ILECs.
3. If the ITCs charged their existing access rates for the origination of this traffic, Bell Atlantic most likely would be paying more to the ITCs than it would be collecting from its retail customers, the ISPs. We also note, however, that in the recent past, there has been no direct relationship between access revenue billed as a result of calling by a particular customer and the amount of retail revenue obtained from that same customer. Access rates are the same for all minutes and no longer vary according to calling volumes (as they did under versions of Chapter 280 of the Commission's rules prior to the enactment of 35-A M.R.S.A. § 7101-B) while retail rates vary considerably.

4. A substantial amount of the internet traffic originating in ITC territory that will terminate in Bell Atlantic territory will be incremental. At least two ILECs block the traffic. Most ITCs charge regular toll rates for that traffic. Accordingly, they are presently not receiving significant amount of revenue for that traffic because per-minute toll rates defer end users from subscribing to ISPs that are located in Bell Atlantic territory.

III. THE EXPANTION OF THE RETAIL AND TWO WHOLESALE SERVICES

There is some misunderstanding about the rates discussed in the Examiner's Report. As discussed above, the Commission proposed in its last order that all ILECs offer the retail and wholesale services that Bell Atlantic has included in its SNS/PRI proposal. The Advisors recommend that the Commission confirm this intent. The Advisors also recommend that all ILECs offer an additional wholesale rate that consists of three components. That rate is discussed in the Examiner's Report and at sub-part C below.

A. The Retail Service that ILECS Will Offer ISPs

The first service proposed by the Commission in the June 22, 1999 Order, reflected in BA-ME's proposal, is a *retail interexchange* service that the ILECs would offer to ISPs. The rate to ISPs would be flat. There would be no usage component (per-minute or otherwise). The service is an *inward* (called party pays) service; it will be offered to ISPs and paid for by ISPs. As proposed by Bell Atlantic, the prefix of the numbers assigned to this service will be 500; that prefix would be followed by a 7-digit number. Persons calling those numbers (end-user customers of ISPs) would not be

charged for the service (except indirectly through their payments to the ISP). The rate proposed for this service by Bell Atlantic is acceptable to the Advisors. It represents a substantial discount from the toll rates for the calling volumes directed to ISPs. It satisfies the criterion of 35-A M.R.S.A. § 7101(4), which requires “affordable access” to computer-based information services. Although not required to do so, competitive IXC's may also offer a similar service. In order to facilitate such offerings by IXC's, the advisors are recommending to the Commission that the ILEC's offer two additional wholesale rates, described below.

B. The Wholesale Discounted SNS/PRI Rate

The Advisors recommend to the Commission that it require ILEC's to offer essentially the same retail rate available to ISPs (described in sub-A above) to IXC's at a discounted wholesale rate for resale to ISPs. The amount of the discount represents costs (if any) e.g., for billing, that the ILEC's avoid, if any, by providing the service on a wholesale basis to IXC's rather than on a retail basis to ISPs. The TelAct (47 USC § 251(C)(4)) requires such wholesale rates. The requirement applies to “any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.” The provision does not draw any distinction between local exchange and interexchange services. Our review of TAM's two filings and Bell Atlantic's response in the case is that the parties appear to understand this proposed rate.

C. The Wholesale Rate Broken into Transport, Switching and Commonline Components

The Examiner's Report recommended that the Commission require a second wholesale rate. In this Supplemental Examiner's Report we explain that rate is

in greater detail and make clear our recommendation that the Commission require all ILECs to offer the rate. The rate is the same wholesale rate described in sub-part B above, broken down into three components: transport, switching and common line. The total of the three components would be equal to the single-element wholesale rate.⁴

In its Response to the questions raised by TAM, Bell Atlantic has presented an argument (essentially an advance exception to the Examiner's Report) that it should not be required to provide such a rate. Bell Atlantic argues that it should not be required to provide the rate proposed by the Examiners because IXCs may instead purchase unbundled network elements (UNEs). Elsewhere in its reply Bell Atlantic clearly recognizes that the retail and wholesale services that the Commission and BA have proposed are *interexchange* services, but its argument appears to overlook that important point. The language of the TelAct (47 USC § 251(c)(3)) would appear to permit interexchange carriers to purchase UNEs.

Nevertheless, the primary purpose of UNEs is to allow CLECs to obtain facilities that may be used for providing local exchange service and exchange access.⁵ Interexchange carriers do not need and should not be required to purchase a local loop simply to originate or terminate some of the interexchange traffic that is carried over that

⁴The same costs, e.g. , billing, are avoided by an ILEC selling to a wholesale purchaser, whether under the single-element or the three-element rate.

⁵"Exchange access" is the term used by the TelAct for what this Commission has traditionally labeled "interexchange access," i.e., the service and rates provided by local exchange carriers for the origination and termination of interexchange traffic by interexchange carriers.

loop.⁶ As stated in the Examiner's Report, if an interexchange carrier is able to provide its own switching or transport, it should be able to avoid paying Bell Atlantic or other ILECs for those access charge components. Bell Atlantic suggests that the advisors have proposed this three-component rate because of concerns that the wholesale discount alone would not be sufficient to allow other competing IXC's to offer competitive rates. The Examiner's Report did express that concern, as it had been raised by Brooks.⁷ Nevertheless, the more important point is that the wholesale service and the rates in question are *access* rates. The proposed three-component rate has the same structure as access charges have had in Maine since their inception. Interexchange carriers have always been able to avoid all or portions of the transport or switching elements of ILEC access charges by providing their own if they can provide those services to themselves at less cost than the access charge rates.

As explained in the Examiner's Report, the Advisors intend that the three components of this rate in total should equal the amount of the single-component wholesale access rate described in sub-part B.⁸ TAM suggests in its Renewed Request that it believes some portion of some of the rates described in the Examiner's Report

⁶Having proposed that IXC's must obtain UNEs, rather than purchase access from a rate that contains switching and transport components, Bell Atlantic then appears to argue that there is at present no reliable UNE pricing.

⁷As noted in the Examiner's Report, Brooks is not an IXC and it therefore was somewhat misleading for the Examiner's Report to imply that Brooks could benefit directly from the three-component rate.

⁸Bell Atlantic appears to suggest that it is inappropriate to break down the wholesale rate into three components (two of them avoidable) because "the wholesale discount required by the TelAct reflects the incumbent LEC's avoided costs when the retail service is provided by a competitor via resale."

are usage-based. TAM is not specific about what portion or what rate it believes is usage-based, but it is possible that it has assumed that the transport and switching components of the three-component rate would be usage-based, as they are in the case of "traditional" (non-internet) access rates. Beyond stating that the three components should add up to the amount of the single-component flat rate, the Examiner's Report was not wholly clear on this matter. For the three components to add up to a benchmark flat rate, however, each of them must also be flat-rated.

We propose that Bell Atlantic develop flat-rated switching and transport components based on reasonable and verifiable load assumptions in the case of high-volume internet traffic. Bell Atlantic shall file a proposal for these flat-rated switching and transported components within 30 days following the Commission's Order that addresses this matter with an explanation and supporting information showing why it has proposed the particular rate levels.⁹

Dated: April 13, 2000

Submitted by,

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Hearing Examiner

⁹If BA-ME believes such an exercise is too complex, it may explain its reasons for that opinion, and propose instead use the switching and transport charges that are presently contained in its existing regular access tariff.